

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

EDWARD M. GRANADO,

Petitioner,

vs.

EVANS, Warden,

Respondents.

No. C 07-04596 JF (PR)

ORDER GRANTING MOTION  
TO DISMISS

(Docket Nos. 4, 8 & 9)

Petitioner, a state prisoner proceeding pro se, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Respondent has moved to dismiss the petition as untimely (Docket No. 4). Petitioner's motion for leave to file opposition (Docket No. 8) is GRANTED. Petitioner's motion for ruling (Docket No. 9) is DENIED as moot. For the reasons discussed below, the Court grants Respondent's motion to dismiss the petition as untimely.

**BACKGROUND**

On January 24, 2002, Petitioner was convicted in Santa Clara County Superior Court of two counts of bank robbery, pursuant to California Penal Code sections 211-

1 212.5(c), and sentence enhancements for prior convictions were found to be true. The  
2 trial court sentenced Petitioner to a term of 55 years to life in state prison. Petitioner  
3 appealed his conviction, and the state appellate court affirmed. His petition for review to  
4 the California Supreme Court was denied on October 15, 2003. Petitioner thereafter filed  
5 petitions for a writ of habeas corpus in all three levels of the California courts, and all  
6 three petitions were denied, including the California Supreme Court's denial on August  
7 10, 2005. Petitioner filed the instant federal habeas petition on September 5, 2007.

## 8 9 **DISCUSSION**

### 10 A. Standard of Review

11 The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") became  
12 law on April 24, 1996, and imposed for the first time a statute of limitation on petitions  
13 for a writ of habeas corpus filed by state prisoners. Petitions filed by prisoners  
14 challenging non-capital state convictions or sentences must be filed within one year of the  
15 latest of the date on which: (1) the judgment became final after the conclusion of direct  
16 review or the time passed for seeking direct review; (2) an impediment to filing an  
17 application created by unconstitutional state action was removed, if such action prevented  
18 petitioner from filing; (3) the constitutional right asserted was recognized by the Supreme  
19 Court, if the right was newly recognized by the Supreme Court and made retroactive to  
20 cases on collateral review; or (4) the factual predicate of the claim could have been  
21 discovered through the exercise of due diligence. 28 U.S.C. § 2244(d)(1). Time during  
22 which a properly filed application for state post-conviction or other collateral review is  
23 pending is excluded from the one-year time limit. Id. § 2244(d)(2).

24 A state prisoner with a conviction finalized after April 24, 1996, as in the case of  
25 Petitioner, ordinarily must file his federal habeas petition within one year of the date his  
26 process of direct review came to an end. See Calderon v. United States District Court  
27 (Beeler), 128 F.3d 1283, 1286 (9th Cir. 1997), overruled in part on other grounds by  
28 Calderon v. United States District Court (Kelly), 163 F.3d 530 (9th Cir. 1998) (en banc).

1 The one-year period generally will run from “the date on which the judgment became  
2 final by conclusion of direct review or the expiration of the time for seeking such  
3 review.” 28 U.S.C. § 2244(d)(1)(A).

4 “Direct review” includes the period within which a petitioner can file a petition for  
5 a writ of certiorari from the United States Supreme Court, whether or not the petitioner  
6 actually files such a petition. Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999).

7 Accordingly, if a petitioner fails to seek a writ of certiorari from the United States  
8 Supreme Court, the AEDPA’s one-year limitations period begins to run on the date the  
9 ninety-day period defined by Supreme Court Rule 13 expires. See Miranda v. Castro,  
10 292 F.3d 1063, 1065 (9th Cir. 2002) (where petitioner did not file petition for certiorari,  
11 his conviction became final 90 days after the California Supreme Court denied review);  
12 Bowen, 188 F.3d at 1159 (same). As the Eighth Circuit put it: “[T]he running of the  
13 statute of limitations imposed by § 2244(d)(1)(A) is triggered by either (i) the conclusion  
14 of all direct criminal appeals in the state system, followed by either the completion or  
15 denial of certiorari proceedings before the United States Supreme Court; or (ii) if  
16 certiorari was not sought, then by the conclusion of all direct criminal appeals in the state  
17 system followed by the expiration of the time allotted for filing a petition for the writ.”  
18 Smith v. Bowersox, 159 F.3d 345, 348 (8th Cir. 1998), cert. denied, 525 U.S. 1187  
19 (1999).

20 Since Petitioner did not file a petition for certiorari, his conviction became final  
21 ninety days after the California Supreme Court denied review on October 15, 2003, *i.e.*,  
22 on January 13, 2004. Absent tolling, Petitioner had one year, *i.e.*, until January 13, 2005,  
23 to file a federal habeas petition. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir.  
24 2001) (calculating AEDPA’s one-year limitation period according to Federal Rule of  
25 Civil Procedure 6(a)). The instant petition was not filed until August 28, 2007, however.  
26 It is untimely unless the limitation period was tolled for a substantial period of time.

27 B. Statutory Tolling

28 Section 2244(d)(2) tolls the one-year limitation period for the “time during which a

1 properly filed application for State post-conviction or other collateral review with respect  
2 to the pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). The  
3 circumstances under which a state petition will be deemed “pending” for purposes of §  
4 2244(d)(2) is a question of federal law. Welch v. Carey, 350 F.3d 1079, 1080 (9th Cir.  
5 2003) (en banc). An application for collateral review is “pending” in state court “as long  
6 as the ordinary state collateral review process is ‘in continuance’ – i.e., ‘until the  
7 completion of’ that process.” Carey v. Saffold, 536 U.S. 214, 219-20 (2002). In other  
8 words, until the application has achieved final resolution through the State’s post-  
9 conviction procedures, by definition it remains “pending.” Id. at 220. In California, this  
10 means that the statute of limitations is tolled from the time the first state habeas petition is  
11 filed until the California Supreme Court rejects the petitioner’s final collateral challenge,  
12 as long as the petitioner did not “unreasonably delay” in seeking review. Id. at 221-23.  
13 However, if there is any gap between the completion of one round of review and the  
14 commencement of another round of state habeas review, the petitioner is not entitled to  
15 tolling during the gap. See Delhomme v. Ramirez, 340 F.3d 817, 821 (9th Cir.2003);  
16 Biggs v. Duncan, 339 F.3d at 1046-47, 1048 (9th Cir. 2003).

17       Petitioner sought collateral review by filing habeas petitions in the state courts.  
18 Although the actual date of the filing of the first petition in state superior court is not  
19 available, Respondent is willing to give Petitioner the benefit of the greatest possible  
20 tolling and assumes that Petitioner filed his habeas petition in state superior court prior to  
21 the date of finality for his direct appeal, thereby tolling the start of the statute of  
22 limitations from running until the superior court’s denial on February 23, 2004. (Resp’t  
23 Mot. at 3, note 1.) Respondent does not contest that the limitations period was tolled  
24 while Petitioner’s habeas petition was pending in the California Court of Appeal until  
25 April 21, 2004, when the state appellate court denied review. However, Respondent  
26 argues that Petitioner is not entitled to any “gap tolling” for the 169 days, or five and a  
27 half months, between the denial of his habeas petition by the California Court of Appeal  
28 on April 21, 2004 and his filing of a new habeas petition in the California Supreme Court

1 on October 7, 2004. See Delhomme, 340 F.3d at 821. The Court agrees that this five and  
2 a half months period is “far longer” than the 30 to 60 days “that most states provide for  
3 filing an appeal,” and is thus not a “reasonable” delay within the meaning of Carey’s  
4 definition of the term “pending.” Evans v. Chavis, 126 S. Ct. 846, 852 (2006) (finding  
5 six-month delay did not fall within Carey’s definition of “pending”). Therefore, Petitioner  
6 had 196 days remaining on his limitations period, *i.e.*, until February 22, 2006, to file a  
7 timely federal habeas petition after the state high court denied review. However,  
8 Petitioner did not file his first federal habeas petition, Case No. 06-03968 JF (PR), until  
9 June 27, 2006, which was 125 days after the limitations period had expired on February  
10 22, 2006.

11 Petitioner argues in his opposition that his first federal habeas petition was  
12 dismissed through no fault of his own. To whatever extent Petitioner is arguing for  
13 equitable tolling, this claim has no merit. First of all, the period of limitation is not tolled  
14 during the time Petitioner’s first federal habeas petition was filed, *i.e.*, from June 27,  
15 2006, until it was dismissed on April 16, 2007. An application for federal habeas corpus  
16 review is not an “application for State post-conviction or other collateral review” within  
17 the meaning of § 2244(d)(2). Duncan v. Walker, 533 U.S. 167, 180-81 (2001). Thus, the  
18 running of the limitation period is not tolled for the period during which a petition is  
19 pending in federal court. Id. at 181. Most importantly, Petitioner’s first federal habeas  
20 petition was filed *after* the limitation period had already expired as discussed above.  
21 Accordingly, Petitioner has set forth no basis to justify that an “extraordinary exclusion”  
22 should apply to him to save the instant petition from being untimely. Miranda v. Castro,  
23 292 F.3d 1063, 1065 (9th Cir. 2002) (petitioner bears burden of showing that equitable  
24 tolling should apply to him).

25 In sum, with statutory tolling, Petitioner had until February 22, 2006 to file a  
26 timely federal habeas petition. Petitioner filed the instant petition on August 28, 2007,  
27 which is eighteen months after the statute of limitations had expired. Accordingly, the  
28 instant second federal petition is untimely.

**CONCLUSION**

For the foregoing reasons, respondent's motion to dismiss the petition as untimely (Docket No. 4) is GRANTED.

This order terminates Docket Nos. 4, 8 and 9.

IT IS SO ORDERED.

DATED: 2/23/09

  
JEREMY FOGEL  
United States District Judge